2015 IL App (1st) 132174-U

No. 1-13-2174

September 25, 2015

FIFTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RICARDO ALDACO, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 12 CR 17966 The Honorable Nicholas R. Ford, Judge presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

O R D E R

Held: Defendant's conviction for violation of an order of protection is reversed, as the State failed to prove defendant had actual knowledge of the contents of the order. Defendant's mittimus is corrected to reflect 285 days of presentence custody credit.

¶ 1 Following a bench trial, the trial court found defendant, Ricardo Aldaco, guilty of one count of residential burglary and two counts of violation of an order of protection. It subsequently sentenced him to nine years in prison for residential burglary and six years in

prison for violation of an order of protection, ordering the sentences to run concurrently. It also ordered defendant to serve two years of mandatory supervised release (MSR) for residential burglary and one year of MSR for violation of an order of protection, and it credited him for 282 days spent in presentence custody.

¶ 2 Defendant appeals, arguing (1) the State failed to prove him guilty of violating an order of protection, (2) the trial court improperly sentenced him to a six-year extended-term sentence for violating an order of protection, (3) the Illinois Department of Corrections (DOC) improperly doubled his MSR term from two to four years, and (4) he is entitled to 285 days' credit for time spent in presentence custody. For the reasons that follow, we affirm in part, reverse in part, and order defendant's mittimus corrected to reflect an award of 285 days' credit for time spent in presentence custody.

¶ 3 I. BACKGROUND

¶ 4 A. Pretrial Proceedings

¶ 5 The charges in this case arose after defendant went to the home of Krystal Garza, the mother of his two children, while an order of protection was in effect prohibiting him from doing so as well as having contact with Garza. Prior to trial, defendant filed an amended motion to suppress custodial statements he made to Detective Keith Carter and an assistant State's Attorney. He alleged, among other things, that due to his intoxicated condition, he was unable to understand his *Miranda* warnings and thus did not make his statements voluntarily, knowingly, and intelligently. Defendant further alleged that he believed he was speaking with a defense lawyer when he spoke with the assistant State's Attorney.

¶ 6 At a hearing on the motion, Detective Keith Carter testified that he interviewed defendant about four and a half hours after defendant’s arrest. Upon determining that defendant spoke and

understood English, Carter read defendant his *Miranda* rights. Defendant acknowledged that he understood his rights and agreed to talk to Carter. Defendant gave intelligent responses to Carter's questions and did not appear to be confused or under the influence of drugs or alcohol.

¶ 7 Carter testified that defendant said that he went over to the house to see his children. Carter explained to defendant that defendant had an order of protection and that he was not supposed to be there. Carter further explained to defendant that he would need to go before a judge if he wanted his parental rights. Defendant acknowledged that he knew he had an order of protection but said that going to court was a "waste" and he did not want to do so because the court "didn't like men."

¶ 8 About three hours later, an assistant State's Attorney arrived at the police station. Carter first testified that the attorney introduced himself as a clerk of the court, and then said that he was "not 100 percent sure." Carter then testified that the assistant State's Attorney introduced himself as "State's Attorney Mack."

¶ 9 The trial court ruled that the statement defendant made to Carter was admissible. However, it suppressed the statement defendant made to the assistant State's Attorney.[1]

¶ 10 Immediately after the suppression hearing, the matter proceeded to a bench trial. When the State asked to incorporate Carter's testimony into trial, the following exchange occurred.

> "THE COURT: Well, I've got the statements I have right now that you're asking me—First of all is there any objection. I heard the statement, some of it, that being first of all the thing you elicited, [defense counsel], that he had been drinking earlier in the day.
>
> [DEFENSE COUNSEL]: Right.

[1] The transcript does not specify what statement defendant made to the assistant State's attorney.

> THE COURT: And in addition I just want to make sure I capsulated it correctly within my notes. There is an indication that he had knowledge, at least this is the State's assertion, of the existence of an order of protection and that he just wanted to see his kids. Is there anything beyond that?
>
> [ASSISTANT STATE'S ATTORNEY]: That he went over to the victim's house for that purpose.
>
> [DEFENSE COUNSEL]: That's not what was testified to.
>
> THE COURT: Well, recall him."

The trial court then went off the record. When it came back on the record, the court did not set forth its ruling as to the State's request that Carter's testimony be incorporated. Defendant's trial then commenced.

¶ 11 B. Trial

¶ 12 During trial, Krystal Garza testified she had a five-year relationship with defendant and two children with him. Krystal had secured an order of protection against defendant on March 8, 2012, with an expiration date of March 7, 2013. The order of protection barred defendant from any contact with Garza, including entering or remaining in the residence located at 2913 West 25th Street.

¶ 13 According to Krystal, at around 4 p.m. on September 9, 2012, she was at her home at 2913 West 25th Street with her aunt, Juanita Garza, her cousin, Jacob Tijeriana, and her parents, Raul and Rosa. After speaking with Juanita in the kitchen, Krystal took her two children out of the home and called the police. She waited for the police in front of her doorway. As Krystal was waiting, she saw defendant running toward her from the kitchen with a gun in his right hand.

¶ 14 Krystal testified that she ran across the street to the corner of Francisco and 25th, which was less than half a block from the house. Defendant ran after her. A large crowd had gathered to celebrate Mexican Independence Day. Krystal saw about 15 people from the neighborhood at the corner and told them, “[D]on’t let him get me.” Defendant caught up with Krystal and "pulled" her left arm before Krystal broke away.

¶ 15 Krystal further testified that she saw her father, Raul, running from the home toward Krystal with a two-by-four. She also saw a marked police car approaching from California Avenue toward the house. She grabbed defendant to prevent him from running away. At this point, defendant had thrown his gun into the bushes. When the police arrived, they placed defendant in the squad car and searched for the handgun; however, they were unable to find it. Only seconds passed between when Krystal ran out of the house and when the police arrived.

¶ 16 On cross-examination, Krystal acknowledged that when she received the order of protection, defendant was neither present in court nor served in open court with the order. She also testified that she did not recall telling Detective Carter that she saw defendant throw a weapon, nor did she recall telling him that defendant grabbed her arm or hand.

¶ 17 Juanita Garza testified that she was in the home at 2913 West 25th Street when defendant entered. Defendant had called her 10 or 15 times on the telephone that day, starting at around 2 p.m. When Juanita informed Krystal of defendant's repeated phone calls, Krystal took her children across the street.

¶ 18 Juanita further testified that when defendant entered the back door of the kitchen at around 4 p.m., he told her that if she said anything, he would "kill the whole fucking family." Defendant held a gun in his right hand and pointed it up as he threatened her. Juanita called out Krystal’s name, and defendant began running toward Krystal, who was standing at the threshold

of the doorway. Krystal closed the front door and pulled from the outside while defendant pulled from the inside. After putting his gun in his pocket and using both hands, defendant managed to open the door. Krystal ran down the stairs and through the front gate. Juanita eventually saw Krystal in the middle of the crowd with defendant pursuing her. Juanita also saw Raul run across the street with a two-by-four.

¶ 19 On cross-examination, Juanita testified she did not remember whether she told Detective Carter that defendant threatened to kill the family. She also could not recall whether she told him about the gun. On redirect examination, Juanita testified she suffered from "instant memory loss," so she could not recall the preliminary hearing that occurred on September 17, 2012.

¶ 20 Jacob Tijerina testified that he was 15 years old at the time of the trial and was living at 2913 West 25th. As he opened the back door in the kitchen to walk to the backyard, Jacob saw defendant rushing up the stairs. Defendant said, "[W]hy nobody answering the fucking phone" and pushed Jacob against the door with his right forearm. Defendant ran inside to the front door of the house, which he struggled to open. By the time Jacob reached the front door, Krystal was across the street and defendant was chasing her. Krystal stood behind a man in the crowd as defendant tried to grab her. As the police arrived, Krystal tried to hold defendant.

¶ 21 Chicago police officer Michael Kapior testified that when he arrived on the scene, he observed Krystal and defendant in a "physical tussle" with a large crowd in the immediate vicinity. Kapior and his partner separated Krystal and defendant and placed defendant into custody. Kapior then searched the bushes in the immediate area for a gun but found nothing. Kapior spoke with Juanita but did not recall whether Juanita mentioned defendant's threat to kill the whole family. Kapior stated that if Juanita had told him about such a threat and he

remembered it, he would have put that information in his case incident report, and that information was not in his report.

¶ 22 The parties stipulated that defendant had prior convictions, including convictions for unlawful restraint and violation of an order of protection.

¶ 23 On a motion for directed finding, the trial court dismissed several charges against defendant based on its finding that the State failed to prove beyond a reasonable doubt that defendant possessed a weapon. Defendant elected not to testify. Before resting, defense counsel noted that "there was some impeachment with the victim regarding Detective Carter." The matter then proceeded to closing arguments. During its closing, the State argued, among other things, that an order of protected existed, noting the court had heard the testimony of the "Detective" and that defendant "acknowledge[d]" to Carter that he "knew about the existence of the violation of order of protection [*sic*]." Defendant did not object to this portion of the State's argument.

¶ 24 Following closing arguments, the trial court found defendant guilty of residential burglary, predicated on the manner of defendant’s entry into the house and his subsequent behavior. The court also found defendant guilty of the two counts of violation of an order of protection, finding defendant's "knowledge of the order was shown by the testimony [of] the detective during the motion to suppress statements." Defendant did not object.

¶ 25 C. Sentencing

¶ 26 In June 2013, defendant filed a motion for new trial, arguing, *inter alia*, that the trial court erred by finding him guilty of violation of an order of protection. Specifically, defendant claimed "[t]he court seemed to determine that [defendant] knew about the order of protection from his statement. However, it was the Detective that first brought up the order of protection at all, suggesting to [defendant] that the order of protection was in effect and valid."

¶ 27 The trial court denied defendant's motion and the matter proceeded to a sentencing hearing. The court merged defendant's two violation of an order of protection convictions (counts 10 and 11). Count 10 was based on defendant threatening Krystal with bodily harm, while count 11 was based on defendant going to the protected residence. The court sentenced defendant to nine years in prison for residential burglary and six years in prison for violation of an order of protection, ordering the sentences to run concurrently. It also ordered defendant to serve two years of MSR for residential burglary and one year of MSR for violation of an order of protection. The court credited defendant with 282 days for time spent in presentence custody.

¶ 28 This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 On appeal, defendant argues (1) the State failed to prove him guilty beyond a reasonable doubt of violation of an order of protection; (2) the trial court improperly sentenced him to a six-year extended-term sentence for violation of an order of protection; (3) the DOC impermissibly doubled his MSR term from two to four years; and (4) he is entitled to 285 days' credit for time spent in presentence custody.

¶ 31 A. Defendant’s Violation of an Order of Protection Conviction

¶ 32 Defendant first asserts the evidence was insufficient to sustain his conviction for violation of an order of protection, as the State failed to show he had actual knowledge of the relevant content of the order. He contends Carter's testimony at the motion to suppress hearing was not admitted. Further, he argues that even if Carter's testimony was admitted, the State's evidence failed to show he had actual knowledge that the order prohibited him from threatening Krystal or going to the home.

¶ 33 We review a defendant's challenge to the sufficiency of the evidence by determining whether, when viewing the evidence in the light most favorable to the prosecution, "any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime." *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). A reviewing court may not substitute its judgment for that of the fact finder on issues concerning the credibility of witnesses, or the weight of the evidence. *People v. Jackson*, 232 Ill. 2d 246, 280–81 (2009). We apply this standard regardless of whether the evidence is direct or circumstantial, and circumstantial evidence meeting the standard is sufficient to convict a defendant. *Id.* at 281. Reversal is appropriate only where the evidence is "unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of the defendant's guilt." (Internal quotation marks omitted.) *Id.*

¶ 34 To prove defendant guilty of violation of an order of protection, the State was required to show he had been served notice of, or he had otherwise acquired actual knowledge of, the order's contents. 720 ILCS 5/12-3.4(a)(2) (West 2012) (formerly 720 ILCS 5/12-30(a(2)); *People v. Hinton*, 402 Ill. App. 3d 181, 184 (2010). In other words, a defendant must have " 'actual knowledge' that his acts were prohibited." *People v. Hoffman*, 2012 IL App (2d) 110462, ¶ 13. While actual knowledge of the entire contents of the order of protection is not necessary, a defendant must have knowledge of the provisions of the order that he is charged with violating. *People v. Brzowski*, 2015 IL App (3d) 120376, ¶ 31. Actual knowledge can be proved by circumstantial evidence. *Hinton*, 402 Ill. App. 3d at 185. "Circumstantial evidence is proof of facts or circumstances that give rise to reasonable inferences of other facts that tend to establish" a defendant's guilt or innocence. (Internal quotation marks omitted.) *Id*. However, proof regarding a defendant's actual knowledge "cannot be based on circumstances that give rise only

to conjecture and suspicion," and an inference of knowledge cannot be "pyramided on an intervening inference." *Id.*

¶ 35 We first address whether Carter's testimony at the motion to suppress hearing was admitted at trial. See *People v. Clinton*, 397 Ill. App. 3d 215, 230 (2009) ("Evidence that was not before the trier of fact should not be used by the reviewing court to determine the sufficiency of the evidence on appeal."). Defendant contends the record is unclear as to whether the testimony was admitted, given that the court never clearly ruled on the record on the State's request that Carter's testimony be incorporated into trial. However, although the court's ruling is not contained in the record, the record as a whole demonstrates that both parties and the trial court proceeded in a manner indicating such testimony was admitted. At trial, defense counsel stated, before resting, that "there was some impeachment with the victim regarding Detective Carter." Further, counsel did not object when the State asserted during closing arguments that the existence of the order of protection was shown by the "[d]etective whose testimony [the court] heard" and defendant's acknowledgement that he "knew about the existence of the violation of order of protection." In finding defendant guilty of violation of an order of protection, the court stated defendant's "knowledge of the order was shown by the testimony [of] the detective during the motion suppress statements." Defendant made no objection to the State's argument regarding Carter or the court's findings. Later, in his motion for new trial, defendant argued "[t]he court seemed to determine that [defendant] knew about the order of protection from his statement. However, it was the Detective that first brought up the order of protection at all, suggesting to [defendant] that the order of protection was in effect and valid." Defendant did not challenge Carter's testimony on the basis that it was not incorporated. Likewise, at the hearing on the

motion, defendant did not argue that Carter's testimony was not incorporated. Thus, based on all of the foregoing, it is clear the court admitted Carter's testimony.

¶ 36 Nonetheless, even considering Carter's testimony in conjunction with the other testimony at trial, the evidence was insufficient to sustain defendant's conviction. As defendant correctly points out, Krystal testified defendant was not served with a copy of the order of protection in open court and thus, the State was required to show defendant had actual knowledge of the contents of the order. See 720 ILCS 5/12-3.4(a)(2) (West 2012); *Hinton*, 402 Ill. App. 3d at 184. Specifically, the State had to show defendant either knew the order prohibited him from threatening Krystal (count 10) or going to the protected residence at 2913 West 25th Street (count 11).

¶ 37 After carefully reviewing the record, we conclude the State failed to present sufficient evidence to establish that defendant actually knew the order prohibited him from threatening Krystal or going to the residence. Carter testified as follows.

> "Q [Assistant State's Attorney:] And in this initial interview what statement did [defendant] give you? What did he say?
>
> A [Carter:] That he went over to the house because he wanted to see his kids. And I explained to him he has an order of protection. That he wasn't supposed to be there. And that if he wanted his parental rights that he need [*sic*] to go before a judge to get his rights to see his children.
>
> Q. Did he acknowledge that he knew he had an order of protection?
>
> A. Yes.
>
> Q. And when you told him about that, what was his response to that?

A. Well, he said that going to court was going to be a waste, and he didn't really want to do that because they didn't like men."

Later, on cross-examination, Carter provided the following testimony.

"Q [Defense counsel:] After you told him about the order of protection and that he would need to go to court regarding it, that's when he said something that he knew there was an order of protection?

A [Carter:] Yes.

Q. You had brought up the order of protection before [defendant] said anything about it; correct?

A. Yes."

Thus, according to Carter's testimony, defendant acknowledged having an order of protection only after Carter first explained to him that he had an order of protection and that he was not supposed to be at 2913 West 25th Street. Most notably, defendant did not make any statements to Carter suggesting that he knew of the specific provisions of the order. Thus, Carter's testimony suggested, at most, that defendant knew an order of protection existed but failed to establish defendant's knowledge of the terms of that order.

¶ 38 The State argues that other circumstantial evidence in the record supports an inference that defendant knew the order prohibited from being at the home and threatening Krystal. For example, the State notes that defendant told Carter that going to court was a “waste” and he did not want to do so because the court "didn't like men." The State posits that if defendant did not know of the order's provisions, he would have no reason to offer such a justification. Further, the State observes that defendant entered through the back door of the home and violently pushed Jacob upon his arrival. However, we would be making a speculative leap by assuming that

defendant engaged in such behavior or made the aforementioned statement to Carter because he knew the order specifically prohibited from being at the home or threatening Krystal. See *Hinton*, 402 Ill. App. 3d at 185 ("Proof of actual knowledge cannot be based on circumstances that give rise only to conjecture and suspicion."). The State also notes that defendant tried to flee as the police approached while he and Krystal were standing outside. However, we agree with defendant that while evidence of flight may support an inference that a defendant believes he did *something* wrong, it fails to establish defendant's actual knowledge of the order's provisions in this case, particularly given that defendant also committed residential burglary and could have been fleeing to avoid arrest for that offense. Finally, with respect to the provision precluding defendant from threatening Krystal, we note that multiple people lived in the home at 2913 West 25th Street. Thus, we are not persuaded by the State's contention that since defendant knew the order concerned Krystal's residence, he must have known it protected her. Furthermore, an inference of knowledge may not be "pyramided on an intervening inference." *Hinton*, 402 Ill. App. 3d at 185. In this case, we would be impermissibly inferring defendant's knowledge that the order precluded him from threatening Krystal by first inferring he knew the order precluded him from going to the home.

¶ 39 As it is clearly distinguishable, we find unpersuasive the State's reliance on *People v. Ramos*, 316 Ill. App. 3d 18 (2000). There, the defendant entered the residence of his former wife on July 17 after (1) an officer told him on July 15 that an order of protection was in effect prohibiting him from entering the home and (2) he spoke to his ex-wife about the existence of the order on July 13 and he acknowledged that an order of protection was in effect. *Ramos*, 316 Ill. App. 3d at 24. Here, by contrast, the evidence failed to establish that anybody told defendant about the specific provisions of the order of protection. Similarly distinguishable is *People v.*

Gee, 276 Ill. App. 3d 198 (1995). In that case, an officer testified that he personally served the defendant with the order of protection. *Gee*, 276 Ill. App. 3d at 200. Thus, *Gee* offers no support for the State's position that the evidence in this case proved defendant's actual knowledge of the contents of the order of protection.

¶ 40 In sum, the evidence in this case fell short of establishing beyond a reasonable doubt that defendant had actual knowledge of the relevant portions of the order of protection. Accordingly, we must reverse his conviction for violation of an order of protection.

¶ 41 B. Defendant's Extended-Term Sentence

¶ 42 Defendant next asserts that his six-year extended-term sentence for violation of an order of protection was improper. However, as we are vacating his conviction for that offense, we need not address his assertions.

¶ 43 C. Defendant's Period of MSR

Defendant also argues that the State, through the DOC, impermissibly increased his MSR sentence. He observes that the trial court imposed a two-year MSR term for his residential burglary conviction and a one-year term for his violation of an order of protection conviction; however, based on DOC's website, he maintains the State has imposed a four-year MSR term, apparently for violating the order of protection. However, given that we are vacating defendant's conviction for violation of an order of protection, we need not address his arguments regarding the MSR term that attached to that conviction.

¶ 44 D. Presentence Credit

¶ 45 Finally, defendant argues, and the State concedes, that he should be awarded three additional days of credit for time spent in presentence custody. We agree.

¶ 46 A criminal defendant is entitled to receive credit for time spent in custody prior to sentencing. 730 ILCS 5/5–4.5–100(b) (West 2012). The day of sentencing is not included when calculating presentence credit. *People v. Alvarez*, 2012 IL App (1st) 092119, ¶ 71. We may correct a defendant's mittimus instead of remanding the case to the trial court. *Id.*

¶ 47 The mittimus reflects that defendant was awarded 282 days in presentence credit. However, the parties agree that as he was arrested on September 9, 2012, and sentenced on June 21, 2013, he is entitled to 285 days of presentence credit. We therefore correct the mittimus to reflect an award of 285 days of presentence credit.

¶ 48 III. CONCLUSION

¶ 49 For the reasons stated, we affirm defendant's residential burglary conviction, reverse his conviction for violation of an order of protection, and order his mittimus corrected to reflect 285 days' credit for time spent in presentence custody.

¶ 50 Affirmed in part, reversed in part, mittimus corrected.